84-959 (1)

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ALEXANDER L. STEVAS,
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No.

IN THE

Supreme Court of the United States

October Term, 1984

STATE OF INDIANA,
Petitioner,

vs.

JOHN H. MOORE, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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QUESTION PRESENTED

Whether the explanation to an in-custody defendant, who has been advised of his rights and has invoked his right to counsel, that the police cannot question him further and that if he desires to discuss the case further he will have to contact the police constitutes "interrogation" and would be proscribed by the Court's holding in *Edwards v. Arizona*.

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STATE OF INDIANA,
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JOHN H. MOORE, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Petitioner, State of Indiana, respectfully requests the Court to issue a Writ of Certiorari directed to the Supreme Court of Indiana and, thereby, review the decision entered by that court in cause number 1182 S 433 on September 5, 1984.

OPINION BELOW

The opinion of the Indiana Supreme Court was rendered on September 5, 1984, and is officially reported at 467 N.E.2d 710. The opinion is set forth in Petitioner's

Appendix A. Petitioner filed a timely petition for rehearing on September 19, 1984, which petition was denied on October 22, 1984. A copy of the denial of the petition for rehearing is contained in Petitioner's Appendix B.

STATEMENT OF JURISDICTION

The State of Indiana petitions for a Writ of Certiorari from a decision, in a criminal case, of the highest court in the state of Indiana. The state court opinion was rendered on September 5, 1984, and a timely petition for rehearing was denied on October 22, 1984. The Court has jurisdiction to review the judgment of the Indiana Supreme Court by writ of certiorari under the provisions of 28 U.S.C. §1257(3). The petition is timely filed under the provisions of Rule 20.1 of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment V.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment XIV, §1.

STATEMENT OF THE CASE

On January 17, 1982, Arthur Jordan was working as a taxi cab driver. In the early morning hours of that day he was robbed and stabbed.

In the course of the police investigation of the robbery and stabbing of Arthur Jordan Respondent, a juvenile, became a suspect. Respondent and his parents were requested to appear at the police station for questioning. When Respondent and his parents arrived at the police station Respondent was placed under arrest by Detective Trathen. Respondent was advised of his rights and permitted to consult alone with his parents.

Detective Trathen began a tape recorded interview of Respondent, again advising Respondent and his parents of Respondent's rights, and Respondent requested an attorney. Detective Trathen then turned off the tape recorder.

Detective Trathen then explained to Respondent and his parents that he could not continue with the interrogation and that if Respondent wanted to talk further or make it right with him he (Respondent) would have to contact the detective. At this time Respondent blurted out that he did it but did not cut the victim.[1].

[1] The relevant portion of the testimony of Detective Trathen at the motion to suppress hearing regarding what he told Respondent and what Respondent stated is set forth in Appendix C.

Detective Trathen then inquired of his fellow detectives of the propriety of resuming questioning of Respondent. Thereafter Detective Trathen returned to Respondent and his parents and proceeded to take an unrecorded statement from Respondent. A second tape recorded statement was then taken, in which Respondent was again advised of his rights, and Respondent confessed in this statement.

Prior to trial Respondent filed a Motion to Suppress. In his Motion to Suppress Respondent sought to exclude from evidence his statement to the police on the ground that it was taken in violation of his rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. The trial court, following a hearing on the motion, denied the motion to suppress.

At Respondent's trial, when Detective Trathen testified as to Respondent's statement, counsel for Respondent registered an objection to the testimony based upon the grounds argued in the pretrial motion to suppress.

Following his conviction and sentence Respondent, in his Motion to Correct Errors, again argued that his statement should have been suppressed. In his appeal to the Indiana Supreme Court Respondent, once more, argued that his statement was involuntary and that he should not have been interrogated after he requested an attorney.

In its opinion of September 5, 1984, the Indiana Supreme Court reversed Respondent's conviction. In its opinion the Indiana Supreme Court held that Detective Trathen interrogated Respondent after he had requested an attorney.

In its Petition for Rehearing, the State of Indiana argued that Detective Trathen did not initiate further interrogation of Respondent after the request for an attorney was

made by Respondent. The Indiana Supreme Court denied the State's Petition for Rehearing.

SUMMARY OF REASONS FOR ALLOWANCE OF THE WRIT

The Indiana Supreme Court incorrectly decided an important federal question which has not been settled by the Court. The Indiana Supreme Court incorrectly held that explaining to an in-custody defendant, who has invoked the right to counsel, that further questioning cannot be had unless the defendant initiates such questioning constitutes interrogation in violation of the proscription of *Edwards v. Arizona*. Petitioner contends that the mere advisement of the right to be free of further questioning does not constitute interrogation.

REASONS FOR ALLOWANCE OF THE WRIT

It is axiomatic that an accused enjoys the right against self-incrimination and the right to counsel. *United States Constitution*, Amendments V and XIV. Flowing from these rights is the now settled proposition that when a person is subject to custodial *interrogation* and requests an attorney any further discussion of the case is permitted only if the accused initiates further contact and discussion. *Edwards v. Arizona*, 451 U.S. 477 (1981), U.S. *reh. den.* 101 S.Ct. 3128. In addition, not only must the accused initiate the subsequent discussion, but the accused must also voluntarily, intelligently, and knowingly waive his constitutional rights. *Oregon v. Bradshaw*, ___ U.S. ___, 103 S.Ct. 2830, 2834-2835 (1983).

In the case at bar, it is not disputed that Respondent requested an attorney when first advised of his rights and questioned by Detective Trathen. What is in dispute is whether the statements made by Detective Trathen after Respondent requested an attorney, that further questioning or discussion of the case could not continue and that if

Respondent desired to discuss the case he would have to contact the detective, constituted "interrogation" within the proscription of the *Edwards* decision. The precise question presented in this Petition has not previously been addressed by the Court.

In order to determine the issue presented in this Petition for Writ of Certiorari it is necessary to examine the definition of "custodial interrogation." The term was defined by the Court in *Rhode Island v. Innis*, 446 U.S. 291 (1980), wherein the Court held:

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response. (emphasis original)

at U.S. 300-302.

Petitioner asserts that Detective Trathen did not *expressly* question Respondent after the request for an

attorney was made (See Appendix C). The question presented by this Petition therefore becomes: Whether Respondent was subjected to the functional equivalent of interrogation? Petitioner asserts that the answer is no.

Petitioner submits that Detective Trathen, in effect, merely explained to Respondent the procedures ennuciated in *Edwards* for questioning of a suspect after an assertion of the right to counsel has been made. Detective Trathen's statements to Respondent (See Appendix C) were not such as "*...should have been known* were reasonably likely to elicit an incriminating response." *Rhode Island v. Innis, supra,* at U.S. 302 (emphasis original).

Counsel for Petitioner has been unable to find any case in which a conversation between the police and the suspect in which the police have explained they cannot talk further with the accused and that any further discussion of the case will have to be initiated by the accused, such as occurred in the case at bar, has been discussed by the Court. However, it is clear that not every conversation with an in-custody defendant, following a request for an attorney, constitutes "interrogation."

It has been held that the questioning of a defendant in the context of routine booking procedures, with respect to normal biographical data of the defendant, does not normally constitute interrogation for such questioning is not intended to elicit an incriminating response. *United States v. Avery,* 717 F.2d 1020, 1024-1025 (6th Cir. 1983), U.S. *cert. den.* 104 S.Ct. 1683, U.S. *reh. den.* 104 S.Ct. 2377; *United States v. Morrow,* 731 F.2d 233, 237 (4th Cir. 1984), U.S. *cert. den.* 104 S.Ct. 2689.

Similarly, a statement by police to an accused that he should consider cooperating with the authorities has been held not to be interrogation for it was not designed to elicit an incriminating response. *United States v. Guido,* 704 F.2d, 675 (2nd Cir. 1983).

Petitioner submits that the same rationale applies in the

case at bar. Detective Trathen merely advised Respondent of his right under *Edwards* not to be further questioned unless he (Respondent) desired further discussion of the case. Certainly the mere advisement of the right not to be further questioned cannot be held to have been designed to elicit an incriminating response. Indeed, in a case involving the advisement of the *Miranda* rights it has been held that incriminating statements made by an accused while being advised of his rights were spontaneous utterances and that the authorities had no reason to believe that the advisement of rights would elicit an incriminating response from the defendant. *United States v. DeLaLuz Gallegos*, 738 F.2d 378, 380-381 (10th Cir. 1984).

It is therefore Petitioner's position that Detective Trathen's statements to Respondent after the request for an attorney, regarding the fact that he could not further question Respondent, were not interrogation. Detective Trathen's statements clearly were not an attempt to badger Respondent, which is the evil that *Edwards* sought to curb. *See Oregon v. Bradshaw, supra*, 103 S.Ct. 2834. Nor, was it a sophisticated, subtle method of eliciting incriminating evidence. *See United States v. Thoma*, 726 F.2d 1191, 1195-1196 (7th Cir. 1984), U.S. *cert. den.* 104 S.Ct. 2683.

The Indiana Supreme Court opinion holding that Detective Trathen's statements to Petitioner were interrogation is in error.

With respect to Respondent's statement to Detective Trathen, it is Petitioner's position that Respondent's statement following the advisement that further questioning would have to be initiated by Respondent was a spontaneous utterance. As a spontaneous utterance the statement was not in violation of Respondent's rights. *Avery, supra*, 1025; *DeLaLuz Gallegos, supra*, 381.

Petitioner further asserts that Respondent's spontaneous utterance of guilt was sufficient to initiate further interrogation following the request for an attorney. Indeed, in

United States v. Kroesser, 731 F.2d 1509 (11th Cir. 1984), an expression of regret at having involved another in the criminal activity was sufficient to constitute an initiation of further interrogation. Moreover, in *Oregon v. Bradshaw, supra*, the defendant's inquiry of what was then going to happen to him was held sufficient to permit further interrogation.

The only remaining question, then, is whether Respondent's subsequent tape recorded statement was given following a valid waiver of rights. Petitioner maintains that the answer to this question is clearly affirmative.

Whether there has been a valid waiver of rights requires an examination of the totality of the circumstances. *Edwards v. Arizona, supra; Oregon v. Bradshaw, supra.*

In the case at bar, Respondent, when first questioned, was fully advised of his rights and was permitted to consult, alone, with his parents. Respondent then requested an attorney but when Detective Trathen advised Respondent that there could then be no further questioning unless Respondent initiated the questioning, Respondent made a spontaneous utterance of guilt. Respondent's utterance was sufficient to initiate further discussion of the case, although Detective Trathen sought the advise of other officers regarding the propriety of further questioning. Although Respondent was not asked to sign a separate rights waiver, he was advised of his rights again before the second tape recorded interview. Respondent then readily confessed to his involvement in the crime.

Petitioner submits that Respondent's rights were scrupulously observed and that the above facts demonstrate that Respondent's confession was given only after a valid waiver of rights by Respondent. *See Oregon v. Bradshaw, supra; Wyrick v. Fields*, 459 U.S. 42 (1982); *Kroesser, supra.*

CONCLUSION

For the foregoing reasons, the Petitioner, State of Indiana, respectfully urges that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Attorney General of Indiana

By: William E. Daily
Deputy Attorney General

By: Michael Gene Worden
Deputy Attorney General

Attorneys for Petitioner

APPENDIX

APPENDIX A

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IN THE

SUPREME COURT OF INDIANA

JOHN H. MOORE, JR.,	)	
	)	
Appellant,	)	
	)	
v.	)	NO. 1182 S 433
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM MARION SUPERIOR COURT, CRIMINAL DIVISION VI
Honorable Thomas E. Alsip, Judge

DEBRULER, Jr. —.

This is a direct appeal from a conviction for robbery, a class A felony, Ind. Code §35-42-5-1. The case was tried before a jury. Appellant was a sixteen-year-old juvenile

who was tried as an adult. Appellant was sentenced to a term of twenty-two years.

The issue dealt with in this appeal is whether appellant's assertion of his right to counsel and the subsequent police-initiated interrogation in the absence of counsel rendered his confession and second taped statement inadmissible.

The facts pertinent to the appeal show that on January 16, 1982, Arthur Jordan was working part-time for Metro Taxicab Company. At 2:30 a.m. on January 17, 1982, he responded to a call to pick up a passenger at 1954 North LaSalle Street. Two men came out of the house and got into the cab. Mr. Jordan started driving toward the 2300 block of Winthrop. When Mr. Jordan arrived at the 2300 Block of Alvord Street, one of the passengers told him to stop the cab. Both men pulled knives on him, took two hundred dollars, kicked him out of the car and drove away.

An investigation of the incident commenced, and it was determined that appellant and Arthur Ausley were the two men that emerged from 1954 North LaSalle Street and entered the cab on the night in question. Appellant's parents were telephoned and were asked to bring their son down to the police station for questioning. On January 18, 1982, at about 5:30 p.m., appellant and his parents arrived at the police station.

After appellant had been processed through the juvenile branch Detective Trathen placed him and his parents in an interrogation room. Detective Trathen read appellant his rights, and before finishing the reading Trathen stopped and advised Moore he was under arrest for robbery. Detective Trathen then left the room for twenty minutes so that appellant could confer with his parents. Afterwards, Detective Trathen returned and finished reading the waiver of rights form. Appellant and his parents signed a police department waiver acknowledging that Detective Trathen had advised appellant of his right to stop questioning at any time if he decided to have an attorney.

Detective Trathen then attempted to take a recorded statement. He read appellant his rights again and asked him:

> "Q. Knowing all your rights, do you wish to give this statement at this time?
>
> A. If you have a lawyer, can you call him?
>
> Q. Do you want a lawyer now?
>
> A. I already have one.
>
> Q. Do you want a lawyer now?
>
> A. Yes."

At this point Detective Trathen explained to appellant and his parents that once appellant expressed his rights to have an attorney, he could no longer question him in regard to the investigation. Detective Trathen stated:

> "John, if you want to get this right, you're going to have to call me, because I can't come and see you. If you know this is serious business, and if you decide you want to talk to me, you're going to have to call."

Appellant then admitted:

> "Man, I want to get this right, we did it; but I didn't stick the man; Arthur did."

Detective Trathen left the room to consult with his superiors to the propriety of taping a second statement. Appellant was not asked to sign a separate rights waiver before the commencement of the second taping statement because Detective Trathen believed that the first rights waiver was sufficient. Detective Trathen then took the second taped statement. In the statement the appellant was advised of his rights and he waived them in this manner:

> "Q. Knowing all your rights, do you wish to give this statement at this time?
>
> A. Yes."

Appellant then gave a detailed statement of his involvement in the crime.

The Fifth and Fourteenth Amendments to the United States Constitution secure to each citizen the right to the presence and advice of counsel during custodial interrogation by the police. *Miranda v. Arizona*, (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. A confession of guilt procured from a subject during custodial interrogation is not admissible in a trial of criminal charges in the absence of proof beyond a reasonable doubt that counsel was present or the right thereto was voluntarily and knowingly relinquished prior to the commencement of the interrogation. *Pirtle v. State*, (1975) 263 Ind. 16, 322 N.E.2d 634; *Oritz v. State*, (1976) 265 Ind. 549, 356 N.E.2d 1188. When the right of counsel is asserted during questioning that process must cease, and a confession procured by interrogators thereafter is per se inadmissible in the absence of a new waiver of counsel evidenced by proof that the suspect initiated the resumption of questioning. *Edwards v. Arizona*, (1981) 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378.

In this case, appellant answered in unambiguous terms that he wanted an attorney present during questioning. Detective Trathen recognized that this was an assertion of the right to counsel and turned off the tape recorder. At this point the interrogation should have ceased. Instead Detective Trathen initiated further conversation with his statement that began with "if you want to get it right, you're going to have to call me". This is a declarative statement that seeks a response. In this context it is the equivalent of "do you want to get it right", and that is how the appellant interpreted it when he said, "Man, I want to get it right, we did it." The conversation initiated by Detective Trathen was a resumption of the interrogation in violation of *Edwards v. Arizona, supra*, and as a result the subsequent confession and taped statement are inadmissible.

The conviction is reversed and the case is remanded for a new trial.

Givan, C.J., Hunter, Prentice and Pivarnik J.J., concur.

APPENDIX B

STATE OF INDIANA

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS
MARJORIE H. O'LAUGHLIN, CLERK
217 STATE HOUSE

INDIANAPOLIS, 46204

TELEPHONE 232-1930

No. 11825433

John H.Moore ,Jr. V. State of Indiana

You are hereby notified that the Supreme Court

has on this day Appellee's petition for Rehearing is hereby DENIED, without Opinion. Givan,C.J. All Justices Concur.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court,

this 22 day of Oct, 19 84

Marjorie W. O'Laughlin
Clerk Supreme Court and Court of Appeals

A. This is in between the two statements. I advised the Defendant that since he expressed a desire to have an attorney, that I could no longer question him. I advised him at that point that if he wanted to discuss this with me at any other time, that it would be up to him to contact me, that I could not longer question him. I advised him, and his parents were present, that this was a very serious matter, and if he wanted to get it right with me, that he should contact me. At that time he broke down stating, "I did it. I didn't cut the the man."

Q. When did you make this statement to him that you just related?

A. I explained, it was after taking the first statement.

Q. When after taking the first statement?

A. Immediately following the first statement.

(R. III, 318, ls.6-21).

Q. Now, after you asked the question, "Do you want a lawyer now?", and Mr. Moore gave the response, "Yes", the machine was turned off at that time, is that correct?

A. That's correct.

Q. Now, after he made that statement, uh, did you ask him any other questions in an effort to gain a statement as to what occurred?

A. No, sir, I did not. Interrogation ended.

(R.III, 339, ls.12-20).

Q. After the tape machine was turned off during your effort to obtain the first statement, you had a further conversation off tape with Mr. Moore, is that correct?

Q. That's correct.

Q. Now, in the course of that conversation, it was your

testimony earlier that Mr. Moore made a statement during that conversation to you regarding this incident.

A. He did.

Q. Could you explain when and under what circumstances in the course of that conversation that Mr. Moore's statement came about?

A. Immediately after I shut the machine off during the first statement, I advised Ar—, uh, John Moore and his parents that at this point, I could no longer conduct the interview. I could no longer interrogate him about this crime; that if any time he wanted to speak with me or if he wanted to get this right with me, that he would have to come to me. I could no longer go to him to ask questions. I advised him, uh, that, I gave them cards with my phone number. I told him that he should think about it and let me know. At this time, John Moore broke down and said, "Man, I want to get it right". He says, "I was with Art. He cut the dude. I took some of the money, but I had nothing to do with hurting that man".

Q. Did you ask Mr. Moore any question immediately before he made that statement?

A. No, I did not.

(R.III, 341, 1.7 - R.III, 342, 1.9).

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Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF INDIANA

RESPONDENT JOHN H. MOORE, JR.'S BRIEF IN OPPOSITION

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Attorney for Respondent

I.

QUESTIONS PRESENTED

Whether the statements made to an in-custody juvenile defendant, who has been advised of his rights and has invoked his right to counsel, that the police cannot question him further and that he should tell the truth and get this thing right because it's serious business and lies can hurt you, and he should think about it and contact the police, constitutes "interrogation" and would be proscribed by the Court's holding in Edwards v. Arizona.

Whether this juvenile defendant knowingly made an intelligent waiver of his right to counsel and his right to silence under the totality of the circumstances which include the fact that the police, rather than the accused, initiated and reopened the dialogue after a request for counsel was made.

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II.

TABLE OF AUTHORITIES

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ON WRIT OF CERTIORARI
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OF INDIANA

RESPONDENT JOHN H. MOORE, JR.'S BRIEF IN OPPOSITION

Respondent, John H. Moore, Jr., respectfully requests the Court to deny the State of Indiana's Petition for Writ of Certiorari directed to the Supreme Court of Indiana and, thereby, to let stand the decision entered by that court in cause number 1182S433 on September 5, 1984.

III.

STATEMENTS OF JURISDICTION AND APPLICABLE CONSTITUTIONAL PROVISIONS

Pursuant to Rule 34(2) of this Court, Respondent John H. Moore, Jr. accepts the statements of jurisdiction and the applicable constitutional provisions recited in the State of Indiana's petition.

IV.

STATEMENT OF THE CASE

John H. Moore, Jr. accepts the State of Indiana's statement of the case with the following qualifications.

Cab driver Arthur Jordan was hit on the head with a flashlight and he was cut when he touched his attacker's knife. He was treated as an emergency room patient and released.

The relevant facts occurred during a forty-five minute interval between the time John Moore requested an attorney, and Detective Trathen turned off his tape recorder, and the time when the recorder was turned on and a second statement taken.

During this period Detective Trathen spent the first five to ten minutes advising John Moore what was going to happen. (A-1) Trathen denies interrogating John Moore during this interval, but he admits telling John Moore he should tell the truth and get this thing right. He told John Moore this was serious business and if the young man wanted to get it right, he would have to call Trathen who couldn't ask him any more questions. (A-3). Trathen said " . . . it's always good to tell the truth, and I tell people when I interview them that they should tell the truth -- that the truth won't hurt you, but the lies certainly would."

John Moore testified that after he requested a lawyer, Detective Trathen told him he would drop charges of attempted murder and vehicle theft if he cooperated with him. (B-1). Trathen denies making such an offer.

After Trathen spoke with John Moore for the first five or

ten minutes of this forty-five minute period, Moore told the officer he was involved in the robbery but he had no part in cutting the cab driver.

Detective Trathen then left the room and consulted with some fellow officers about what to do. He then returned and recorded John Moore's confession.

V.

SUMMARY OF REASONS FOR DENYING THE WRIT

After sixteen year old John Moore voluntarily appeared at the police station, he was processed and placed in an interrogation room. John Moore asked for an attorney. His request was met with a five or ten minute lecture about telling the truth, getting it right, the need to call the police and an admonishment that lies can hurt you. These statements by Detective Trathen constituted interrogation and were prohibited by this Court's ruling in Edwards v. Arizona 451 U.S. 477 (1981).

The five or ten minute discourse by Detective Trathen was either express questioning or its functional equivalent. Taking into account the tender years of John Moore and his youthful sensitivity to coercion, Detective Trathen should have known his statements would elicit a possible incriminating response.

After the request for counsel, the conversation which led to John Moore's confession was initiated by Detective Trathen. Even assuming arguendo that Trathen's "tell the truth and get it right" speech does not constitute interrogation, there was no showing John Moore knowingly and voluntarily waived his right to counsel.

VI.

REASONS FOR DENYING THE WRIT

Sixteen year old John H. Moore, Jr. arrives at a police station with his parents in response to a telephone call by a detective. He is booked and placed in an interrogation room. A Detective Trathen enters the room and reads the young man his

rights. In the middle of the reading the detective stops and states the juvenile is under arrest for robbery. The officer leaves the room for twenty minutes and then returns to finish the Miranda warning and turn on a tape recorder. The boy refuses to give a statement and asks to speak with his lawyer.

At this point in time Detective Trathen should have refrained from further interrogating this teenager. Trathen turned off his tape recorder, but he did not stop talking. He continued talking for five or ten minutes. He told the impressionable lad that this was "serious business" and he should think about it. He stated John Moore should tell the truth and lies can hurt you. The detective said if Moore wanted to get this thing right, he would have to come to him and meet with him. The detective presented John Moore with his card, and at the end of this scenario the boy broke down and said he was involved in the crime but he didn't cut the taxi driver. This is what happened according to Detective Trathen. Johh Moore testified Trathen offered to drop some of the charges if he would tell the truth.

The detective's insistence the prisoner get it right, tell the truth, think about it and call him, constituted interrogation within the context of Rhode Island v. Innis 446 U.S. 291 (1980). This was express questioning or certainly its functional equivalent. The cold record does not reveal whether the officer's voice inflection was declaratory or inquisitive as he spoke these admonishments. Nor does it matter. Innis does not require a grammarian's question mark behind every custodial statement:

> "We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the

> fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response."
>
> (446 U.S. at 301).

Unlike Innis, this is not a case where two police officers are having a casual conversation between themselves about the location of a deadly weapon posing a danger to handicapped children, which is followed by an adult suspect's unsolicited confession. John Moore is a juvenile who has been processed as a criminal and trapped within an interrogation room. When focusing on his perceptions, we cannot ignore his tender years. A hardened ex-convict may have ignored repeated requests to get it right and tell the truth about this serious business, while a mere boy cracks upon the application of this subtle pressure. The test is subjective. The emphasis is on what John Moore perceived, not what Detective Trathen intended him to perceive. Yet when you consider what the detective could have done under these circumstances, it is clear he should have known his provocatory statements would have elicited an incriminating response.

He could have told John Moore to call his attorney. He could have sent John on to a jail cell and terminated the interview with a simple good bye. Upon John's exit, he could have addressed the parents about the gravity of the situation. Instead the officer confronted this youngster head-on by telling him he was in deep trouble and he should call him and straighten out the situation because lies can hurt you while the truth cannot. Detective Trathen's true intentions aside, his comments stimulated a response that was obviously foreseeable and predictable under these circumstances.

Although it was subtle, there is no doubt John Moore was interrogated after he exercised his right to consult his attorney. This conclusion is buttressed by the fact that after John asked for counsel, the next exchange which led to the incrimination was initiated by the police. Edwards v. Arizona 451 U.S. 486, at 484-485 (1981) stresses the significance of who initiates the admission:

> "Second, although we have held that after initially being advised of his Miranda rights, the accused may himself validly waive his rights and resond to interrogation, see North Carolina v. Butler, supra, 441 U.S., at 372-376, 99 S.Ct., at 1757-1759, the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."

John Moore did not initiate further conversation after exercising his right to counsel. Detective Trathen elicited the exchange. Ignoring for a moment the content of the communication and whether or not it constituted "interrogation", who initiates the discussion is an important variable in determining whether a valid waiver of the right to be silent and obtain counsel occurred.

Assuming arguendo the Court rejects John Moore's contention Detective Trathen's statements constituted interrogation, the State of Indiana must nonetheless show that under a totality of the circumstances the Respondent made a knowing and intelligent waiver of his constitutional rights. Oregon v. Bradshaw ___ U.S. ___, 103 S.Ct. 2830 (1983). Again the determination of who initiated the conversation is very important. To establish a waiver, there should be a showing the suspect initiated the dialogue with the authorities:

> "We think the Oregon Court of Appeals misapprehended the test laid down in Edwards. We did not there hold that the initiation of a conversation by a defendant such as respondent would amount to a waiver of a previously invoked right to counsel; we held that after the right to counsel had been asserted by an accused, further interrogation of the accused should not take place 'unless the accused himself initiates further communication, exchanges, or conversations with the police.' 451 U.S. at 485, 101 S.Ct., at 1885. This was in effect a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in Edwards was. We recently restated the requirement in Wyrick v. Fields, ___ U.S. ___, ___, 103 S.Ct., 394, 395, 74 L.Ed.2d 214 (1982) (per curiam), to be that before a suspect in custody can be subject to further interrogation after he requests an attorney there must be a showing that the 'suspect himself initiates dialogue with the authorities.'"
>
> Oregon v. Bradshaw 103 S.Ct. at 2834.

The determination of whether or not John Moore made a valid waiver of his right to counsel depends upon the particular facts and circumstances surrounding the case. The background, experience, and conduct of the suspect are important considerations. North Carolina v. Butler, 441 U.S. 369 at 374-375, (1979). Again, the age of John Moore is a critical factor. He was too young to understand the implications of the situation. He asks for counsel, and after five or ten minutes of lecture on the importance of telling the truth, he blurts out a confession. This is no foundation on which to build a knowing and intelligent waiver of the valuable right to an attorney. Although the Indiana Supreme Court never formally reached this second step of the analysis, because the court ruled interrogation had occurred, the court indirectly refers to the fact there was no proof beyond a reasonable doubt John Moore voluntarily waived his right to counsel before confessing.

VII.

CONCLUSION

For the foregoing reasons, the Respondent urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

By: _____
Joseph M. Dietz
Attorney for Respondent

APPENDIX A

This appendix consists of testimony from Detective Trathen given at the hearing on the motion to suppress. It includes the contents of the State of Indiana's Appendix C plus additional testimony which was omitted from the State's Appendix C.

A This is in between the two statements. I advised the Defendant that since he expressed a desire to have an attorney, that I could no longer question him. I advised him at that point that if he wanted to discuss this with me at any other time, that it would be up to him to contact me, that I could no longer question him. I advised him, and his parents were present, that this was a very serious matter, and if he wanted to get it right with me, that he should contact me. At that time he broke down stating, "I did it. I didn't cut the man."

Q When did you make this statement to him that you just related?

A I explained, it was after taking the first statement.

Q When after taking the first statement?

A Immediately following the first statement.

Q Alright, and, now you told us earlier that the second statement was about forty-five minutes later, and that you were only gone a portion of that time, correct?

A I said I may have left the room. I'm not sure how long it was.

Q Alright, but the second statement was forty-five minutes later, correct?

A Yes.

Q But you told us now that he broke down immediately, is that your testimony?

A I didn't say immediately. I said that I advised him of what was going to happen from that point on. That may have taken five minutes, it may have taken ten minutes, but then he did.

Q Well, did you tell him anything more than what you've told us today in Court?

A I immediately quit interrogating the Defendant that time. I advised him and his parents that if he wished to, wished to speak with me again, that it would be up to him to contact me. That I could no longer interrogate him or question him.

Q Okay. Is that all you said?

A That is it.

Q What did you do for the final four minutes and fifty-five seconds, because you just said it took about five minutes. What happened to the other four minutes and fifty-five seconds?

A You're being awful specific. What we did at that point, when he broke down and admitted his involvement in this crime, and he said he wanted to get it right and give me a statement, that's when I left the room to determine whether or not I should do so. Now, I don't know if that took five minutes or maybe fifteen minutes, but that's the time. I believe I attempted to contact Mr. Whittingham, who was the robbery co-ordinator (sic), to get his opinion as to how I should pursue this?

Q And were you able to do that?

A No, I was not. This was in the evening.

Q And, uh, then after this ten or fifteen minutes talking to Detective Christ and Detective Layton, you, what did you do then?

A Okay. Before the, after I decided I would go ahead and take the second statement, I interviewed him as to what would be on the tape, asked him what happened, tell him explain the robbery to me.

Q Was this recorded, excuse me, what this recorded?

A No, it was not.

Q Alright. Did, did you ask Mr. Moore to sign a separate rights waiver between the taking of, between, before the commencement of the second statement?

A No, because he had previously been advised of his rights.

Q Okay. So you were relying on the first rights waiver, correct?

A Well, I think that was sufficient.

Q Alright. And then you took an untaped statement from him? Correct?

A I interviewed him.

Q Alright. And that was not on tape, right?

A No, it was not.

Q Did you make any notes of that?

A Uh, I may have jotted some down. However, I believe I do not have them here, or I do, could be in my notebook. I don't believe that I do. I think, basically, the, uh, what he explained to me --

Q Well, now, before we get into --

A There were no notes.

Q Okay. Thank you. And then I think you said forty minutes later the second statement was made and that, that was then taped, is that right?

A At, uh, nineteen thirty-three hours I started the second tape.

(R. III, 318 to 321 at line 15; Direct Examination of Detective Trathen)

* * * * *

Q After the tape machine was turned off during your effort to obtain the first statement, you had a further conversation off tape with Mr. Moore, is that correct?

A That's correct.

Q Now, in the course of that conversation, it was your testimony earlier that Mr. Moore made a statement during that conversation to you regarding this incident.

A He did.

Q Could you explain when and under what circumstances in the course of that conversation that Mr. Moore's statement came about?

A Immediately after I shut the machine off during the first statement, I advised Ar--, uh, John Moore and his parents that at this point, I could no longer conduct the interview. I could no longer interrogate him about this crime; that if any time he wanted to speak with me or if he wanted to get this right with me, that he would have to come to me. I could no longer go to him to ask questions. I advised him, uh, that, I gave them cards with my phone number. I told him that he should think about it and let me know. At this time, John Moore broke down and said, "Man, I want to get it right". He says, "I was with Art. He cut the dude. I took some of the money, but I had nothing to do with hurting that man".

Q Did you ask Mr. Moore any question immediately before he made that statement?

A No, I did not.

(R. III 341 to 342 at line 9; Cross Examination of Detective Trathen)

* * * * *

Q Do you recall if you, recall about five minutes ago me asking you whether or not there's anything else significant that had happened, and you saying, "no"? Do you remember that? Just a few minutes ago, me asking you those questions?

A I remember asking me, asking me that question. You didn't ask me--

Q Thank you. Do you remember your answer? Do you remember your answer?

A Yes, I do.

Q Your answer was "no", wasn't it?

A Yes, I do.

Q Okay. Since that time, you told the Court about a statement, I guess before Defendant's Exhibit 2, is that correct?

A Apparently you didn't ask the question.

Q Ah, it's the -- I see. Now you said you wanted Mr. Moore to get it right. Would tell the Court what you meant by "get it right with you"?

A That's just a term that, to get his story correct, to tell the truth.

Q To get it -- I see. To get it right.

A To tell the truth.

Q To tell the truth. You told him, you, you told him that he had to tell you the truth. That he ought to tell you the truth, right?

A I told --

Q Correct?

A No, my words were, Counselor, that if he wanted to get it right, tell the truth, that he would have to contact me.

Q I see. Now let me show you Defendant's Exhibit 2, and I'd like you to read the final question and answer.

A I read it a few minutes ago, but I'll read it again.

Q Okay. Tell me what is ambiguous about that question and answer.

A I don't understand what you mean, sir.

Q Well, he, you asked him, "Do you want a lawyer now", and he said, "Yes". Did he not?

A That's correct.

Q You testified on cross examination you felt that was ambiguous. Tell about what you felt in that question and answer was ambiguous.

A I didn't say that this question -- what I'm -- my statement is this, I am not so sure that he was not confused. Perhaps he was. I'm stating this, that the second statement was given after he was offered an opportunity to have an attorney present. I followed what I believed to be the law by stopping when I did.

Q When, when was he offered an opportunity to have an attorney present?

A I asked him before the second taping, as I have testified to.

Q Is that on tape?

A There is, it's on tape in the second statement when I asked his parents if this was with his own free will and permission.

Q Well, is it on tape that you ask his --

A Not that -- no.

Q Thank you. Now, you said Moore, you told Moore if he wanted to get this right with me, what did you mean by, "if you wanted to get it right with me"?

A I believe I answered that question. Get it right means to tell the truth.

Q You just wanted to tell you the truth?

A That's correct.

Q Okay. Did you, did you explain to Mr. Moore that, that by telling you the truth, something good would happen?

A I, I don't believe I -- I didn't promise him anything if that's what you're driving at. I, it's always good to tell the truth, and I tell people when I interview them that they should tell the truth. That the truth won't hurt you, but the lies certainly would.

Q And did you tell Mr. Moore that?

A I may have.

Q Thank you.

(R. III, 346 to 349 at line 9; Redirect Examination of Detective Trathen)

APPENDIX B

This appendix consists of the direct examination of John Moore conducted at the hearing on his motion to suppress.

Q What is your name, please?

A John H. Moore, Jr.

Q And, Mr. Moore, how old are you?

A Sixteen.

Q Now, at the time you were arrested, what crimes were you told you were under arrest for?

A Armed Robbery, Attempted Murder, and Vehicle Theft.

Q Three charges, is that correct?

A Yes.

Q Now, after you requested a lawyer, did Detective Trathen indicate to you that anything would happen if those, if you were, if you got right with him, if you told him the truth.

A Yes.

Q What did he tell you?

A He said he would drop the Attempted Murder and the Vehicle Theft if I co-operated (sic) with him.

(R. III, 351, lines 13-27 and 352, lines 1-3; Direct Examination of John Moore)

No. 84-959

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

STATE OF INDIANA,

Petitioner,

vs.

JOHN H. MOORE, JR.,

Respondent.

PROOF OF SERVICE

Under penalties for perjury, I do solemnly swear that I have served three (3) copies of Respondent John H. Moore, Jr.'s Brief in Opposition this 11th day of January, 1985 via United States First Class Mail, postage prepaid, upon Petitioner's counsel, Linley E. Pearson, William E. Daily and Michael Gene Worden, Office of the Attorney General, 219 State House, Indianapolis, Indiana, 46204.

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STATE OF INDIANA)
) SS:
COUNTY OF MARION)

SUBSCRIBED AND SWORN to before me, a Notary Public in and for said County and State, this 11th day of January, 1985.

Carol S. Foust
Carol S. Foust, Notary Public

My Commission Expires:
October 20, 1986

My County of Residence is:
Hendricks